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First report on the provisional application of treaties

Prepared by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur

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I. Introduction

A. Purpose of this report

1. This first report will attempt to establish, in general terms, the principal legal issues that arise in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The study of provisional application will, of course, begin with article 25 of the 1969 Vienna Convention on the Law of Treaties.

2. Since the purpose of the report is to identify the issues that should be given further consideration in subsequent reports and in the International Law Commission's discussion of those reports, its scope will be limited to systematizing some general aspects of the concept of the provisional application of treaties in order to determine, at the outset, the principal parameters for the usefulness of this concept in light of the needs of States and the dynamics of international relations.

B. Background

3. The topic of the provisional application of treaties was included in the long-term programme of work of the Commission in 2011 during its sixty-third session (A/66/10, para. 365). During this session, Mr. Giorgio Gaja submitted a document that described some of the legal problems arising from the provisional application of treaties (A/66/10, annex C).

4. In 2012, during its sixty-fourth session, the Commission decided to include the topic in its programme of work and to appoint a special rapporteur. At that time, the recently appointed Special Rapporteur held informal consultations with the members of the Commission in order to open a dialogue on issues relevant to the handling of the topic and delivered an oral report on those consultations. The Commission then decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties. (A/67/10, para. 143). The Special Rapporteur would like to thank the Secretariat for preparing this memorandum (A/CN.4/658), which sets out the legislative history of the wording of article 25 of the Vienna Convention and contains an extremely useful analysis of several substantive issues that arise in that regard. He also notes that the discussions in the Sixth Committee of the General Assembly during its consideration of the report of the Commission on the work of its sixty-fourth session were very useful to him in preparing this report.

5. Article 25 of the Vienna Convention is the outcome of a discussion in the Commission that began in the 1950s. The legislative history of the article in question is highly relevant to the handling of this topic. As mentioned in the previous paragraph, the Secretariat prepared a memorandum that summarizes both the procedural history and the substantive issues discussed by the Commission during the process leading to the drafting of article 25. The Special Rapporteur considers it unnecessary to summarize the Secretariat's investigation in his report but will refer to the document (A/CN.4/658) in order to review the history of the topic in question.

6. The Special Rapporteur also sees no need to discuss the drafting of article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations at this stage of his study of the topic. However, the issue may be considered at a later date.

C. Terminology

7. An analysis of the concept of the provisional application of treaties must begin with the distinction between "provisional application" and "provisional entry into force"; these terms are not synonymous and refer to different legal concepts.

8. The topic of provisional entry into force was officially proposed by Special Rapporteur Sir Humphrey Waldock in the context of "mode and date of entry into force" and "legal effects of the entry into force of a treaty".[1] However, the Commission's Drafting Committee decided to combine these issues in a single article entitled "Provisional entry into force",[2] which it adopted on first reading as draft article 24.[3] During the discussion of the draft article on second reading, Paul Reuter mentioned that the words "come into force provisionally" were incorrect and proposed to replace them by "be applied provisionally".[4] However, the Commission decided to retain the words "provisional entry into force" and adopted draft article 24[5] in 1965 with several modifications to the previous text:

> 1. A treaty may enter into force provisionally if:
>
> (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States;
>
> or
>
> (b) The contracting States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

9. The Commission adopted the draft article, renumbered as 22, on second reading.[6]

10. In the reactions to the draft article, it is interesting to note the position taken by States such as the Netherlands, which ultimately considered that such a situation would only result in a non-binding agreement concerning provisional entry into force, which the States would be free to suspend.[7] This shows that the legal consequences of the provisional entry into force of treaties were, to say the least, not entirely clear.

11. During the Vienna Conference on the Law of Treaties, however, a draft amendment submitted by Yugoslavia and Czechoslovakia that would have replaced

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[1] *Yearbook of the International Law Commission, 1962*, vol. II, A/CN.4/144, pp. 68-71.
[2] *Yearbook ... 1962*, vol. I, 668th meeting, pp. 254-267.
[3] *Yearbook ... 1962*, vol. II, doc. A/5209, para. 23.
[4] *Yearbook ... 1965*, vol. I, 790th meeting, para. 75.
[5] *Yearbook ... 1965*, vol. II, doc. A/6009, para. 29.
[6] *Yearbook ... 1966*, doc. A/6309/Rev.1, part II, para. 38.
[7] *Yearbook ... 1966*, vol. II, doc. A/6309/Rev.1, part II, annex.

the words "entry into force provisionally" by "provisional application"[8] was discussed. Various delegations supported the idea that a distinction must be made between provisional application and provisional entry into force. Italy was in favour of changing the wording, stating that this would avoid confusion between application, which was a question of practice, and entry into force, which was a formal legal notion.[9]

12. France and Japan expressed concern at the lack of clarity regarding the legal nature of provisional entry into force. The Japanese delegation also wondered whether there was sufficient practice to establish a distinct legal institution, while the French delegation stated that the existence of practice made it necessary for the convention to safeguard the freedom of States to agree that a treaty could enter into force provisionally.[10]

13. After stating that the issue was the application of the treaty rather than its entry into force, the delegation of Israel said that the word "provisionally" referred to time, not to legal effects.[11]

14. It is also interesting to note that in its *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, published in 1994, the Treaty Section of the Secretariat Office of Legal Affairs deals with matters relating to the provisional application and the provisional entry into force of treaties under the same heading; this suggests that for the Secretariat, at least at the time, the two legal concepts were comparable.[12]

15. However, Anthony Aust believes that "to speak of provisional entry into force is confusing, and could mislead one into believing that the treaty is already in force, albeit on some kind of conditional basis".[13]

16. There is no doubt that in practice, the indiscriminate use of the two terms has led to confusion regarding the scope and content of the concept of the provisional application of treaties. Consider, for example, the uncertainty arising from situations in which the national authorities responsible for the implementation of a treaty do not know whether its provisional application has legal consequences, and even whether all the procedures for ratification of a treaty are required if the contracting parties have agreed to its provisional application.

17. In any event, article 25 of the Vienna Convention sets the minimum standard on the matter:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

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[8] See the comments made by Switzerland and the United Kingdom in *Official Records of the United Nations Conference on the Law of Treaties, First Session* (United Nations publication, Sales No. E.68.V.7), Summary records of meetings of the Committee of the Whole, 26th meeting, paras. 46-50.

[9] Ibid., para. 43.

[10] Ibid., paras. 39-41 and 45.

[11] Ibid., para. 44.

[12] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15), paras. 237-241.

[13] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press, 2000), p. 139.

(a) The treaty itself so provides; or

(b) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

18. This article has been criticized as difficult to understand[14] and lacking in legal precision.[15] However, it has also been said that article 25 "provides the technical framework of how States may go about the provisional application of a treaty".[16]

19. While article 25 has sometimes been described as the basis for the "provisional entry into force" of a treaty, it refers expressly to the provisional application of a treaty and makes no mention of its entry into force.

20. The legal regime will depend on both the interpretation of the treaty that mentions this concept and the terms in which provisional application is agreed in a treaty or, where applicable, a separate agreement.

21. In fact, while article 25 of the Vienna Convention presupposes supplementary application, and in light of the lack of uniform regulations on the matter, the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty to be applied provisionally. In some cases, a single clause establishes the applicable regime[17] while in others, its inclusion is far more complex and detailed and may lead to the establishment of some form of special regime.[18] All of these factors raise various questions regarding the interpretation and scope of the provisional application of treaties. However, there are also common elements that can provide guidance in identifying potential legal effects of the concept, which will be mentioned below.

22. For example, without in any way claiming to provide an exhaustive set of definitions, the following characteristics, which take into account the variety of situations that arise in practice, may be identified:

(a) Some treaties state that explicit acceptance of provisional application of a treaty is required, while others do not;

(b) The expression of intention may be unilateral, but it may also be made by two or more contracting parties;

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[14] Albane Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111.

[15] Martin A. Rogoff and Barbara E. Gauditz, "The Provisional Application of International Agreements", in *Maine Law Review*, vol. 39 (1987), No. 1, p. 41.

[16] Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (The Hague, Martinus Nijhoff, 2012), p. 22.

[17] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (United Nations, *Treaty Series*, vol. 2056, No. 35597), art. 18; Arms Trade Treaty (A/CONF.217/2013/L.3), art. 23.

[18] Energy Charter Treaty (1994), art. 45; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (United Nations, *Treaty Series*, vol. 1836, No. 31364), art. 7.

(c) In some cases, a statement of the acceptance of provisional application may be made when the treaty is signed while in other cases, it is to be made when depositing the instrument of ratification, accession or acceptance;

(d) Provisional application may also be limited to specific provisions of the treaty;

(e) Such application may end with the entry into force of the treaty itself, or with its entry into force for the State that had decided to apply it provisionally;

(f) The provisional application clause may also require or involve an expression of the State's ultimate intention to ratify the treaty.

23. It is, however, possible to identify common elements that can provide guidance in identifying the legal effects of the provisional application of treaties:

(a) An unequivocal expression of the State's intention that the treaty be applied provisionally is invariably required;

(b) Generally speaking, provisional application is intended as a transitory mechanism pending the entry into force of the treaty; however, there no reason that it cannot bind the State indefinitely, even after the entry into force of the treaty, if the parties so desire.

24. Specific cases that reflect the issues raised in the previous paragraph will be referred to throughout this report. This exercise does not claim to be exhaustive; it simply offers examples of the broad range of possibilities offered by State practice in this area.

II. Purposes and usefulness of provisional application

25. The purpose of provisional application is to give immediate effect to all or some of the substantive provisions of a treaty without waiting for the completion and effects of the formal requirements for entry into force contained therein.[19] Specifically, it is a mechanism that allows States to give legal effect to a treaty by applying its provisions to certain acts, events and situations before it has entered into force.[20] The concept has been defined as "the application of and binding adherence to a treaty's terms before its entry into force"[21] and as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time".[22]

26. Some of the primary factors that may lead States to resort to the provisional application of treaties are addressed below.

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[19] Denise Mathy, "Article 25", in Olivier Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (Cambridge, Cambridge University Press, 2011), p. 640.

[20] See Mertsch, note 16 above.

[21] René Lefeber, "Treaties, provisional application", R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), para. 1, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1486&recno=1&author=Lefeber%20%20Ren%C3%A9.

[22] Mark E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354.

A. Urgency

27. During the Vienna Conference, the representatives of Romania and Venezuela stressed the need for this provision in situations of urgency.[23] These circumstances have occurred, for example, in treaties relating to the ending of hostilities.[24] This is true of the clauses contained in the 1934 Pact of Balkan Entente[25] and the 1940 Moscow Peace Treaty between Finland and the Union of Soviet Socialist Republics.[26] There has also been a great need for provisional application clauses in the event of a natural disaster. The Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency include express provisions on their provisional application. These Conventions were concluded in response to the 1986 accident at the Chernobyl nuclear power plant. Trade and customs treaties are another example of urgency that has been mentioned in the work of the Commission.[27]

B. Flexibility

28. During the Vienna Conference, various delegations recognized that a provision on provisional application reflected the growing practice of States in that area.[28] Delegations such as those of Costa Rica and Italy said that it would provide a tool that would give greater flexibility to the treaty regime.[29]

29. This element of flexibility in a treaty regime may take various forms. During the work of the Commission, Mr. El-Erian has said that it served a useful purpose where the subject matter was urgent, implementation of the treaty was of great political significance or it was important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of treaties.[30]

30. The flexibility provided by the provisional application of treaties may have various consequences. Geslin suggests that provisional application may be used to modify the provisions of a treaty without the need for an amendment process.[31] On the other hand, Dalton is of the view that "provisional application generally takes

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[23] *Official records* ..., note 8 above, paras. 5 and 29, respectively.

[24] Heike Krieger, "Article 25", in Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg and New York, Springer, 2012), p. 408.

[25] League of Nations, *Treaty Series*, vol. 153, No. 3514.

[26] *American Journal of International Law*, vol. 34 (1940) (Supplement), p. 127.

[27] *Yearbook ... 1959*, vol. I, 487th meeting, para. 37.

[28] *Official Records* ..., note 8 above, 26th meeting, statements made by the representatives of Venezuela (paras. 29 and 31), Israel (para. 44), France (para. 45), Switzerland (para. 46) and the United Kingdom (para. 48); and 27th plenary meeting, statements made by the representatives of Cambodia (para. 4) and Romania (para. 5); and *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), Summary records of the plenary meetings, 11th plenary meeting, statements made by the representatives of Greece (para. 73), Italy (para. 83) and Poland (para. 87).

[29] Ibid., para. 82 (Costa Rica).

[30] *Yearbook ... 1965*, vol. I, 790th meeting, para. 96.

[31] Geslin, note 14 above, p. 32. On provisional application in the context of the United Nations Convention on the Law of the Sea, see Tullio Treves, "L'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer et les conditions de son universalisme", in *Annuaire français de droit international*, vol. XXXIX (1993), p. 869.

place after the signatories have agreed [...] to apply the provisions of a treaty prior to completing the steps that must be taken under their internal law before the treaty can be brought into force. Thus, agreements concluded in simplified form (i.e. that enter into force on signature) are not normally susceptible of provisional application".[32]

C. Precaution

31. Provisional application of a treaty may arise where States have concluded highly sensitive political agreements and wish to build trust in order to prevent the contracting parties from reconsidering their position regarding the entry into force of the treaty during the ratification process.[33] As an example of this situation, Krieger mentions the Protocol on the Provisional Application of Certain Provisions of the 1990 Treaty on Conventional Armed Forces in Europe, the 1992 Treaty on Conventional Armed Forces in Europe and the 1993 Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II).[34] Lefeber notes that provisional application provisions may be motivated by "the aspiration to adopt and implement without delay confidence-building measures, notably in economic matters, following the resolution of an international conflict";[35] article 23 of the Arms Trade Treaty is an example of this.[36] The importance of the legal assets protected by a treaty may also lead States to seek its provisional application. For example, Austria, Mauritius, South Africa, Sweden and Switzerland issued declarations of provisional application, based on humanitarian concerns, when ratifying the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[37]

32. This may also be true of the Arms Trade Treaty, adopted by the United Nations General Assembly on 2 April 2013 (General Assembly resolution 67/234 B), and of the Maritime Boundary Agreement between the United States of America and the Republic of Cuba,[38] for which there is a provisional application agreement that has been renewed on several occasions.[39]

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[32] Robert E. Dalton, "Provisional Application of Treaties" in Duncan B. Hollis, ed., *The Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012), p. 221.

[33] Krieger, note 24 above, p. 409.

[34] Ibid.

[35] Lefeber, note 21 above, para. 2.

[36] "Any State may at the time of signature or the deposit of instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State" (A/CONF.217/2013/L.3, annex).

[37] Andrew Michie, "The Provisional Application of Arms Control Treaties", in *Journal of Conflict and Security Law*, vol. 10, No. 3, 2005, p. 362, cited in Krieger, note 24 above, p. 409.

[38] Maritime Boundary Agreement between the United States of America and the Republic of Cuba, 16 December 1977, art. V.

[39] Agreements between the United States of America and Cuba Extending the Provisional Application of the Agreement of December 16, 1977, effected by exchange of notes at Havana and Washington on 27-28 December 1979, 16 and 28 December 1981, 27 and 30 December 1983 and 3 December 1985.

D. Transition to imminent entry into force

33. Some scholars have considered other reasons for seeking provisional application; one of the primary motives is the prevention of legal gaps between successive treaty regimes.[40] Article 7 of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 is an example of this.[41] The provisional application provided for in this clause was included out of a desire to ensure, in light of the imminent entry into force of that Convention[42] (the necessary instruments of ratification having already been received), that the Agreement's interpretation of Part XI would be effective prior to its entry into force.[43]

E. Other

34. Treaties may also be applied provisionally in order to expedite their implementation prior to completion of the constitutional procedures for their ratification and entry into force. This has also been considered desirable in order to create an incentive for ratification.[44] During the Vienna Conference, the representative of Romania said that provisional application was a tool through which delays in ratification, approval or acceptance could be avoided.[45] Malaysia observed that the provisional application of a treaty was useful in order to avoid the delay entailed by going through the traditional national channels.[46] Thus, the advantages offered by provisional application are sometimes viewed in light not so much of its international legal effects as of its potential effects at the domestic level.

35. The recent practice of the European Union is relevant in this regard.[47] However, others have called for caution; for example, the delegation of Greece has noted that the provisional application of treaties could lead to a conflict between international law and constitutional law[48] and the delegations of Viet Nam, Venezuela, Switzerland, the United States of America and Malaysia have made similar comments.[49] It has also been said that the provisional application of a treaty may be a subterfuge aimed at evading the domestic legal requirements for its approval and subsequent ratification for the sole purpose of avoiding domestic policy situations that make it inconceivable for the competent legislative body to approve the treaty. One relevant example of this situation and the dilemmas that accompany it is the 1977 Maritime Boundary Agreement between the United States of America and the Republic of Cuba.[50]

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[40] Lefeber, note 21 above, para. 2.

[41] United Nations, *Treaty Series*, vol. 1836, No. 31364.

[42] Ibid., vol. 1833, No. 31363.

[43] Krieger, note 24 above, p. 410.

[44] Ibid., p. 408.

[45] *Official Records* ..., note 8 above, 27th meeting, para. 5.

[46] Ibid., para. 7.

[47] Lorand Bartels, "Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?", in *Cambridge Journal of International and Comparative Law*, vol. 1 (1) (2012), p. 118.

[48] Note 28 above (statement made by the representative of Greece).

[49] *Official Records* ..., note 8 above, 26th meeting, paras. 26, 30, 46 and 51, and 27th meeting, para. 7, respectively.

[50] See note 39 above.

III. Legal regime of provisional application

36. As mentioned at the beginning of this report, while article 25 of the Vienna Convention establishes a general regulatory framework for the provisional application of treaties, it does not contain the entire legal regime that applies to this issue. The primary legal regime that regulates provisional application is the regime established for this purpose in the treaty that provides for such application or in another manner, as agreed by the contracting parties.

37. Clearly, the provisional application of treaties has consequences that arise both within the State and at the international level. Like any other engagement between States, a provisional application agreement produces legal effects at the international level.[51] However, in light of the extensive study warranted by this issue, its legal effects will be studied at a later date so that, if the Commission deems it appropriate, their potential impact on the regime of the international responsibility of States can also be explored.

38. It should be noted that in dealing with the issue of provisional application, the Treaty Section of the Secretariat Office of Legal Affairs, in its *Treaty Handbook*, states:

> A State provisionally applies a treaty that has entered into force when it unilaterally undertakes, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. [...] In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).[52]

39. It is interesting to note that this approach assumes that a State will apply provisionally a treaty that is already in force pending its entry into force for that particular State. However, as mentioned above, it is generally assumed that the regime set out in article 25 of the Vienna Convention is based on the scenario of provisional application while the treaty is not yet in force.

40. The following is a review of some of the modalities that occur in State practice.

A. Source of the obligations

1. In a treaty provision

41. Examples include article 7 of the Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe[53] and

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[51] Mathy, note 19 above, p. 652.

[52] *Treaty Handbook* (United Nations publication, Sales No. E.12.V.1), section 3.4.

[53] United Nations, *Treaty Series*, vol. 2441, No. 44001.

article 10 of the 1947 Franco-Belgian Convention for the avoidance of double taxation in regard to taxes on capital.[54]

2. In a separate agreement concerning the treaty

42. Provisional application of part of a treaty may be regulated through an agreement that is separate and different from the treaty. Examples include the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement Providing for the Provisional Application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road and the Arrangement concluded by the Governments represented at the International Health Conference.

B. Forms of expression of intention

43. Whether envisioned in a treaty provision or in a separate agreement between parties, because a State's commitment to apply all or part of a treaty provisionally is the result of an unequivocal expression of its intention, whether implicit or explicit, this expression of intention is the source of the resulting inter-State obligations.

44. However, some are of the view that, depending on the form in which the provisional application clause is drafted, there may be some doubt as to the State's consent.[55] On the one hand, the wording may be straightforward in the sense that no particular provisional application mechanism is required.[56] On the other hand, the clauses may make provisional application contingent on compatibility with States' domestic law.[57] Although the issue of domestic law will not be discussed in this report, it is relevant to note that for the purposes of this section, such a condition is irrelevant, provided that the States have freely consented, since the State has expressed its intention to apply the treaty provisionally under the stipulated modalities. Suffice it to note that in principle, domestic law does not constitute a barrier to provisional application.[58] It should, of course, be noted that matters not covered by the provisional application regime of a specific treaty are governed by the provisions of the Vienna Convention.

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[54] Franco-Belgian Convention for the avoidance of double taxation in regard to taxes on capital, 29 December 1947 (United Nations, *Treaty Series*, vol. 46, No. 704), art. 10.

[55] See Quast, note 16 above, pp. 198-199.

[56] For instance "This Agreement shall be applied provisionally from 1 January 2006" in the 2005 Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the transmission of natural gas through a pipeline between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland (United Nations, *Treaty Series*, vol. 2398, No. 43316, art. 20, para. 2).

[57] For example, "Pending the entry into force of the present Convention in accordance with the provisions of Article 11, the signatory States agree, in order to avoid any delay in the implementation of the present Convention, to apply it provisionally from the date of signature, *in conformity with their respective constitutional systems*". Convention on the Elaboration of a European Pharmacopoeia (Council of Europe, *European Treaty Series*, No. 50), art. 17; emphasis added.

[58] Mathy, note 19 above, p. 646.

1. Express

45. While the parties may express their intention to apply a treaty provisionally,[59] they may also make a declaration to the contrary — in other words, States may expressly state that a treaty shall not be applied provisionally.[60]

46. Article 45 of the 1994 Energy Charter Treaty states:

> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.

2. Tacit

47. Article 7, paragraph 1 (a), of the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 provides one example of tacit acceptance:

> Provisional application
>
> 1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:
>
> (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing.

C. Forms of termination

48. Except where provisional application terminates naturally with the entry into force of the instrument in question, termination is also contingent on the State's expression of intention pursuant to article 25, paragraph 2, of the Vienna Convention.

1. Unilateral notification

49. The Secretariat Office of Legal Affairs *Treaty Handbook* reflects the general rule set out in article 25, paragraph 2, of the Vienna Convention: "The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the Vienna Convention 1969)".[61]

50. Similarly, article 45 of the 1994 Energy Charter Treaty mentions the possibility of terminating provisional application, provided that the State expresses its intention not to be a party to the Treaty:

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[59] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994), art. 7, para. 1 (c).

[60] Ibid., art. 7, para. 1 (b).

[61] *Treaty Handbook*, note 52 above, section 3.4.

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

2. By arrangement between the parties

51. Article 7, paragraph 3, of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea states:

> 3. Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (a) of resolution II has not been fulfilled.

52. What is interesting about this article is that termination of the provisional application of the Agreement does not require an act or declaration by the State; it occurs when the date established for this purpose is reached.

IV. Conclusion and future workplan

53. The views and information presented in this first report raise various issues that can be summarized as follows:

(a) Recourse to the mechanism of provisional application of treaties is neither uniform nor consistent, which suggests that States are unaware of its potential;

(b) The practice described above demonstrates the usefulness that the provisional application of treaties may have under certain circumstances in order to give effect to all or part of the treaty in question;

(c) The variety of situations that occur in contractual relations between States warrants in-depth consideration of State practice, if only in order to determine the most common systems of domestic law;

(d) As with any institution that is regulated by international law, it is necessary to determine whether there are procedural requirements for the provisional application of treaties;

(e) It might be asked what the relationship between the article 25 regime and other provisions of the Vienna Convention, as well as other rules of international law, is;

(f) Lastly, if the provisional application of a treaty is deemed to produce legal effects, the legal consequences of violation of the obligations assumed through such application must be determined.

54. The next report will address all of these issues in order to determine whether, in light of the presumed usefulness of the provisional application of treaties, guidelines or model clauses could be developed in order to encourage States to use this mechanism more often. The Special Rapporteur hopes to create incentives for

greater use of this treaty law mechanism and, for the moment, he has no more ambitious plans. In any event, it is important to resist the temptation to attempt to over-regulate this institution, whose real value stems largely from the degree of flexibility that article 25 of the Vienna Convention gives to contracting parties.

55. The Special Rapporteur awaits the comments and suggestions of the Commission's members and thanks them in advance.